IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1578

BROADCAST MUSIC, INC., et al.,

Petitioners,

—v.—

COLUMBIA BROADCASTING SYSTEM, INC.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al.,

Petitioners,

—v.—

COLUMBIA BROADCASTING SYSTEM, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF NATIONAL BROADCASTING COMPANY, INC., AS *AMICUS CURIAE*

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December 15, 1978

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COLUMBIA BROADCASTING SYSTEM, INC.

MOTION FOR LEAVE TO FILE A BRIEF, AS *AMICUS CURIAE*

National Broadcasting Company, Inc. ("NBC") respectfully petitions for leave to file the annexed brief, *amicus curiae*. NBC owns and operates a nationwide television network which is licensed by ASCAP and BMI and is presently paying the two societies combined some $7,000,000 per annum for the right to perform musical compositions in their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP* and *United States*

v. *BMI*. Consequently, NBC requests permission to file the annexed brief, *amicus curiae*.

Dated: New York, New York
December 15, 1978

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COLUMBIA BROADCASTING SYSTEM, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF NATIONAL BROADCASTING COMPANY, INC., *AMICUS CURIAE*

National Broadcasting Company, Inc. ("NBC") respectfully submits this brief, *amicus curiae*, in order to advise the Court as to its interest in and position with respect to the opinion and order below.

Interest of the *Amicus Curiae*

The NBC Television Network is one of the nationwide television networks licensed by ASCAP and BMI and is

presently paying the two licensing societies combined some $7,000,000 per annum for blanket licenses to perform musical compositions in their respective repertories. As such, it has a direct interest in any decision this Court may render concerning the application of the antitrust laws to ASCAP and BMI and in particular to the construction of the consent decrees in *United States* v. *ASCAP* and *United States* v. *BMI*.

More particularly, the position taken here by the United States, as *amicus curiae*, is in sharp conflict with the position it took in 1971, as plaintiff in *United States* v. *ASCAP*, in a proceeding initiated by NBC under the decree and then pending before the United States Court of Appeals for the Second Circuit. While the present *amicus* brief of the United States construes the ASCAP consent decree to require ASCAP to issue only blanket licenses and rejects the concept of *per se* illegality in connection with ASCAP's activities, the 1971 brief of the United States took the position that ASCAP was required under the decree to issue a non-blanket license limited to specified musical compositions and that its refusal to cooperate with NBC's efforts to procure such a limited license "is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation" (1971 Brief of the United States, p. 15).*

Argument

NBC, like its competitor CBS, has had its differences with ASCAP and BMI over the years. Although NBC has not sought the kind of relief sought by CBS in the pending action, it too has been concerned about the "take it or leave

* A copy of the 1971 brief of the United States, as plaintiff, in *United States* v. *ASCAP*, is reproduced as an appendix to this brief.

it" attitude with which ASCAP and BMI have attempted to impose their blanket licensing structures.

Here, the position espoused by the licensing societies, and now by the United States, essentially presents the television broadcaster with two alternatives—to take blanket licenses from ASCAP and BMI or to obtain all of its music needs entirely through direct licensing, *i.e.*, by "bypassing" ASCAP and BMI. It excludes, as a practical matter, the possibility of a broadcaster obtaining its music requirements in part through the music societies and the remainder through direct licensing—a possibility opened up by the decision of the Court of Appeals which foresees a system of music licensing which will provide alternatives to the music user who wishes to avail himself of them.

A blanket license necessarily lessens competition among music suppliers. In the context of present day television network broadcasting, this lack of competition for music rights presents a unique anomaly. In every other element of programming, price is determined by competitive forces —by one network bidding against the others for programs and by the various program suppliers competing with one another in offering their programs to the networks. Only when it comes to the right to publicly perform copyrighted music is a program element carved out and put beyond competitive forces.

While such a result may be a practical necessity with respect to certain music users, it does not follow that all music must be excluded from the competitive arena in the realm of present day network television. The major portion of the music used on network television today is controlled by a mere handful of parent companies (by and large the established motion picture producers) which have both an ASCAP and BMI publishing subsidiary. These

"publishers" perform few, if any, of the traditional functions of a music publisher and exist mainly as a vehicle to qualify for the receipt of ASCAP or BMI royalties. In terms of gross revenues, it is the parents of those "publishers" which are the principal beneficiaries of the historic ASCAP-BMI blanket licensing system.

When one of the entertainment companies, generally known as "packagers" in the broadcasting business, creates a television program for sale to a network,* it normally employs writers to compose the thematic and background music, which in most instances constitutes the only music used on the program. The packager has "shop rights" to the copyrights used in the same way as a manufacturer obtains "shop rights" to patents resulting from any invention made by his employees during the course of their employment. Thus, a packager could easily sell a complete package directly to the purchaser, not a package which cannot be shown on the air absent a blanket license from ASCAP and/or BMI. The packager's retention of music performance rights, its assignment of these to a "publisher" subsidiary, and its participation in the receipts of the copyright pools serves no economic need. The various considerations advanced to justify indirect, non-competitive licensing through music societies, such as the need for a common agency to police the use of copyrighted compositions and the difficulties in locating a widely dispersed body of composers, are totally absent in this kind of situation. The only thing accomplished is the elimination of competitive pricing for this one program element. Since virtually all of NBC's entertainment programs are acquired

* Virtually all of the entertainment programs shown on the NBC Television Network are produced and owned by independent outside packagers. This season, for example, NBC only produces one regularly-scheduled entertainment program — the one-hour weekly series, "Little House on the Prairie".

from outside purchasers, the anti-competitive impact of ASCAP's and BMI's practices is even more pronounced.

Early in 1970, NBC attempted to procure from ASCAP, under the consent decree in *United States* v. *ASCAP*, a so-called nucleus license rather than a blanket license on the millions of compositions in the ASCAP repertory.* Thus, NBC requested a license limited to some 2,200 compositions and certain background music libraries contained in the ASCAP repertory which its studies showed were used with frequency on the NBC Television Network, or which were contained in programs NBC had "in the can". A comparable request was made of BMI. Such licenses would have permitted NBC to initiate direct licensing with packagers and other large-scale suppliers of music, thus satisfying a major portion of its music requirements through direct negotiations with the copyright owner.

ASCAP vigorously opposed NBC's request, contending that NBC was required to take a blanket license or nothing. A similar position was taken by BMI. NBC then applied to the District Court under the consent decree asking that ASCAP be directed to offer the limited license requested. However, the District Court held in favor of ASCAP, holding that the decree did not require ASCAP to grant a license on anything less than its entire repertory.

NBC then appealed to the Court of Appeals, relying upon the language of the decree itself and the "package licensing" cases; *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.*, 371

* For present purposes, it is immaterial that NBC and CBS may have reached different judgments concerning the most practical and convenient way to deal with the music licensing societies. The real point is that each of the networks should have, and is required to have, the flexibility and fair opportunity to deal for music performance rights in a competitive and proper manner.

U.S. 38 (1962). The United States, in its capacity as plaintiff in the action, filed a brief which, although disagreeing that a package licensing problem was presented, urged reversal of the District Court's decision, noting that:

> "[W]hat is eliminated under a license for ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940)." (Appendix, pp. 13-15).

At this point, before its answering brief was due, ASCAP initiated settlement discussions with NBC which resulted in NBC's taking a blanket license from ASCAP in return for specified amounts. Subsequently, NBC also entered into a blanket license with BMI. In stipulating to dismissal of its appeal as moot, which was "so ordered" by the Court of Appeals on December 21, 1971, ASCAP expressly waived any *res judicata* or collateral estoppel effect with respect to the District Court's order, and it was provided that the dismissal of the appeal was "without prejudice to any

position that any party may take in any future proceeding" under the consent decree.*

Thus, despite its acceptance of blanket licenses in the past, NBC adheres to its legal position that ASCAP and BMI are guilty of *per se* violations of the antitrust laws when they insist users take blanket licenses—or nothing—in situations where a blanket license is not a practical necessity.

The decision of the Court of Appeals—although it does not reach the issue posed by NBC's appeal under the consent decree, *i.e.*, the question of what kind of licenses the decree requires—does, however, concur with the view expressed by the United States in its 1971 brief, *i.e.*, that there is a *per se* antitrust violation when a blanket licensing structure is not based upon practical necessity. The decision below opens up the possibility of a dual licensing structure in which a network could obtain part of its required music licenses from the societies on a per use basis while obtaining the remainder directly from the copyright holder, including program packagers who supply and control the music contained in the programs they sell. Such a result would foster competition in an area where it is presently totally absent. Reversing the opinion below, on the other hand, would in effect give both ASCAP and BMI the unfettered power to continue to extract unnecessary and anticompetitive demands from the networks on a "take it or leave it" basis.

The amicus brief of the United States submitted in this proceeding appears to adopt a position—contrary to that expressed in its 1971 brief—that the ASCAP consent decree contemplates and requires only the issuance of blanket

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* NBC's licenses with ASCAP and BMI expired on September 30, 1976. Since that date, NBC has operated under interim licensing arrangements subject to retroactive adjustment.

licenses (Amicus Brief of the United States, pp. 3-5) and that the refusal of ASCAP and BMI to issue licenses other than blanket licenses is not a *per se* violation of the antitrust laws. In so contending, the *amicus* brief refuses to recognize the differences—which the United States alluded to in its 1971 brief (see quotation, *supra* pp. 9-10)—between a network television broadcaster and other music users, such as the local radio station in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968), which stipulated that, as a practical matter, it could not deal directly with copyright holders. Instead, the United States takes the position here that the antitrust principles are based upon some form of symmetry which requires the courts to blind themselves to the "special circumstances" of television broadcasting (Amicus Brief of the United States, pp. 17-18, fn 17).

NBC respectfully submits that the determination of the Court of Appeals herein reversing the District Court represents the proper analysis of the antitrust laws as applied to music licensing and reaches a result, in its remand to the District Court, which paves the way for competition in the one aspect of television programming where it is now absent.

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Dated: New York, New York
December 15, 1978

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APPENDIX

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 71-1487

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS,

Defendant-Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Applicant-Appellant.

Brief of Plaintiff, United States of America

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Miscellaneous:

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In the

United States Court of Appeals

For the Second Circuit

No. 71-1487

United States of America,

Plaintiff,

v.

American Society of Composers, Authors & Publishers,

Defendant-Appellee,

National Broadcasting Company, Inc.,

Applicant-Appellant.

Brief of Plaintiff, United States of America

This is an appeal by the National Broadcasting Company, Inc. (NBC) from an order and judgment of the District Court for the Southern District of New York (J.A. 437-438a) entered January 25, 1971, denying its application for the determination of a reasonable fee for its requested license for performing rights limited to approximately 2,200 compositions in the repertory of the American Society of Composers, Authors and Publishers (ASCAP).

Question Presented

Whether, under the 1950 Amended Consent Decree in *United States* v. *ASCAP*, Civ. Action 13-95 (S.D.N.Y.),[1]

[1] The relevant portions of the decree are set out in the Appendix, *infra*, pp. 19a-27a.

ASCAP may refuse to license less than its entire repertory of non-dramatic non-exclusive performing rights for copyrighted compositions, where the effect is to deter a bulk music user from dealing directly with individual ASCAP members, thus necessarily preventing any price competition between those members.

Statement

This controversy began in the course of negotiations between ASCAP and NBC for a new five-year license for non-dramatic performing rights to copyrighted musical compositions in ASCAP's repertory. On October 14, 1969, NBC asked ASCAP to quote fees "on a blanket basis and on a per program basis"[2] (J.A. 242a). ASCAP did not immediately make any quotation, insisting that it first needed detailed information about NBC's operation (J.A. 238a). By letter dated March 10, 1970, NBC informed ASCAP that it did not believe that ASCAP was either in need of, or entitled to, the requested information (J.A. 112a). At the same time it made application for "a license for approximately 2,217 compositions and certain background music libraries" (*ibid.*). ASCAP's response, on March 17, 1970, suggested that NBC obtain licenses for the compositions it wanted directly from its members in interest and quoted a fee solely on a blanket basis (J.A. 254a). Ten days later NBC made application to the district court

[2] Both blanket and per program licenses give a licensee the right to use ASCAP's entire repertory. A blanket license simply covers the user's entire operations for the duration of the license and the fee is based upon a percentage of his revenues. A per program license covers only those programs in which ASCAP music is actually used. Its fee is based upon a percentage of revenues obtained from those programs only, but that percentage is higher than that charged under a blanket license.

for an interim fee for its designated selections, expressly withdrawing its October 14, 1969 application. On May 13, 1970, NBC formally petitioned the court to set a fee for the desired compositions under Section IX(A) of the 1950 Amended Consent Decree (J.A. 107a-110a).

Before the district court, NBC argued that ASCAP's insistence upon a blanket license is illegal "package licensing." *Reply Memorandum of National Broadcasting Company, Inc.*, May 1, 1970, pp. 2-5. It also argued that the practice unlawfully fixes the prices paid for ASCAP compositions. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.*, July 10, 1970, p. 13. Moreover, it contended that Section VI obligates ASCAP to ascertain the number of compositions it can license as requested, and Section IX(A) requires the district court to determine a reasonable fee for such a license.

ASCAP maintained that the amended decree does not either expressly or impliedly require it to license less than its entire repertory. *ASCAP's Memorandum in Opposition to NBC's Application*, April 15, 1970, pp. 2-3. Sections V(A) and VII, it argued, alone determine what kind of license must be given to telecasters and those provisions require only blanket and per program licenses. *Id.* at 2.

The United States, supporting NBC's application, asserted that Section VI of the decree requires ASCAP, at NBC's request, to seek licensing authority for specified compositions.

The district court denied NBC's application. It held that Section V(A) defines the scope of a license for a television network as "the ASCAP repertory" and no less (J.A. 433a-434a). It construed Section VI as permissive, not mandatory, and not intended for the use of "bulk" users (J.A. 434a). It dismissed Section IX(A) as procedural only,

without any substantive effect (J.A. 434a). Moreover, it suggested that NBC's requested license, if directed, "might very well import substantial antitrust implications" (J.A. 436a).

Argument

I. Under the Terms of the Amended Consent Decree, ASCAP Cannot Force Bulk Music Users to Take a License for Its Entire Repertory, Where It Effectively Deters Competition Between Individual ASCAP Members.

Within the framework of this appeal, NBC's right to obtain a license for a selected portion of ASCAP's total repertory depends exclusively upon the provisions of the 1950 Amended Consent Decree. *United States* v. *ASCAP (Shenandoah)*, 331 F.2d 117, 123-124 (C.A. 2, 1964). And, construction of the decree "must be discerned within its four corners" in order to determine the bargain struck by the contending parties. *United States* v. *Armour & Co.*, 39 U.S.L. Week 4614 (O.T. 1970, No. 759, June 1, 1971). This the district court did not do. Rather it focused narrowly upon isolated provisions of the decree, without placing its provisions in their proper context. When viewed as a whole, against the background of the problem which necessitated the 1950 Amendment, it is clear that this decree prohibits ASCAP from imposing licenses for its entire repertory in interference with direct licensing between users and its members.

As this Court stated in *Shenandoah, supra* (331 F.2d at 121):

> The Amended Final Judgment (in this case) of March 14, 1950, considerably amplified an earlier con-

sent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948) and M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).

Alden-Rochelle was an action by movie exhibitors for an injunction against ASCAP's practice of separately licensing synchronization of compositions in sound tracks of motion pictures and the performing rights for those works. In effect the exhibitors wanted the performing rights included with the film rights—i.e., licensed at the source—in order to avoid the necessity of paying ASCAP for a blanket license in addition to their costs for film rights. Motion picture producers, who then participated in ASCAP revenues through their publisher subsidiaries, routinely discriminated between non-ASCAP and ASCAP works. As to non-ASCAP compositions they would insist upon both synchronization and performance rights; but, under their arrangement with ASCAP, which held the non-dramatic rights of its members' copyrighted music, they could only receive synchronization rights. Since ASCAP works were used in most films, an exhibitor had no choice but to accept an ASCAP blanket license.

The district court found both ASCAP's structure and practices in licensing motion picture theatres rife with

antitrust violations. Its key findings were that (80 F. Supp., at 894):

> The combination of the members of ASCAP in transferring all their non-dramatic performing rights to ASCAP is a combination in restraint of interstate trade and commerce, which is prohibited by § 1 of the antitrust laws. It restrains competition among the members of ASCAP in marketing the performing rights of their copyrighted works. And by barring a member from assigning the performing rights to the motion picture producer at the same time that the recording right is assigned, the channels in which the films may be marketed is narrowed to those exhibitors who have a license from ASCAP covering the performing rights of the ASCAP music synchronized on the film.

And it further held (80 F. Supp., at 895):

> Where the power to fix prices is created by an agreement among those who control a substantial part of an industry and who should do business on a competitive basis in a free market, the reasonableness of the prices or the good intentions of the combining units would not absolve them from the charge that they have violated the antitrust laws.

The basic principle that ASCAP cannot exploit pooled copyrights to stifle competition between the individual works of its members was emphasized in *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), which passed on the identical practices under review in *Alden-Rochelle*. The court there found that "[f]ree competition among the members of ASCAP to license individually their

music is effectively curbed, if not completely obliterated, by the scheme of operation which the members of ASCAP have adopted." 80 F. Supp. at 847. It concluded that "[c]ompetition is effectually restrained because all licenses are granted by ASCAP under its control and domination." 80 F. Supp. at 849.

It was in light of these decisions that the 1950 Amended Decree was negotiated.[3] And the provisions designed to meet the restraints on individual licensing, which they unearthed, cannot be construed narrowly. *Alden-Rochelle* and *M. Witmark* exposed the vulnerability of ASCAP to collateral antitrust attack in any situation where its collective activities needlessly cut off individual licensing and the competition between individual works that individual bargaining necessarily engenders. See Timberg, *supra*, at 301. The provisions adopted in the Amended Decree reflect this basic understanding of the parties, and the decree broadly preserves the opportunity for licensing on an individual basis. Thus, Section IV(A) permits ASCAP to accept only non-exclusive rights, leaving its members free to license their works independently; Section VI makes possible individual licensing where the member or members of interest cannot be reached; and, Section IV(B) expressly prohibits ASCAP from "[l]imiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance . . . ."

The refusal to deal under the circumstances of this case does interfere with individual licensing with at least one of the anticompetitive effects condemned in *Alden-Rochelle*

[3] In fact, the same provisions were substituted for the judgment in *Alden-Rochelle*. Timberg, "The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950", 19 Law & Contemporary Problems 294, 301 (1954).

and *M. Witmark*—i.e., elimination of price competition. As those decisions effectively demonstrate, the legitimate ambit of ASCAP's normal activities lies precariously close to *per se* violations of the antitrust laws. ASCAP's collective marketing activities have been tolerated largely because composers and publishers individually are unable to do the policing necessary to enforce their evanescent performing rights. Shull, "Collecting Collectively: ASCAP's Perennial Dilemma," 7 Copyright L. Symposium 35 (1956). And the principal justification for licensing ASCAP's entire repertory is that the typical user is unable to bargain individually for performing rights with widely dispersed composers and publishers and still provide the program flexibility he requires. Timberg, *supra*, at 297. To the extent that joint activity is necessary to make the market function at all, there is ample precedent for accommodation of the joint marketing arrangement under the antitrust laws. See *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *St. Louis Terminal*, 224 U.S. 383; *Appalachian Coals Inc.* v. *United States*, 288 U.S. 344; *Chicago Board of Trade* v. *United States*, 246 U.S. 231. But by the same token, where individual dealing is possible, the limited justification for collective action is removed and the joint activity must be subjected to traditional antitrust analysis.

The decree provisions protecting individual licensing draw precisely this distinction. In the words of one well-informed commentator (Timberg, *supra*, at 320):

> While the Amended Consent Judgment vindicates an ASCAP member's rights to license performing rights even while a member of ASCAP, this legal vindication may well be meaningless economically. The fundamental premise underlying ASCAP's continued existence and acceptability to users was that ASCAP's users

needed immediate access to ASCAP's entire range of compositions, and that it was impracticable for them to negotiate with individual writers and publishers. Nevertheless, should economic circumstances ever be propitious for the exercise of this right of individual licensing, its legal basis has been firmly established in the Amended Consent Judgment.[4]

Moreover, the right to deal individually cannot be exclusively that of the copyright holders. In *Alden-Rochelle* and *M. Witmark,* ASCAP members were the primary beneficiaries of the refusal to license individual performing rights. It could hardly have been solely to protect them that those decree provisions designed to preserve individual dealing were written; rather it is clear that the parties understood that the provisions are to preserve opportunities for competition.

Whether or not circumstances are "propitious" for NBC to engage in individual licensing is in the first instance a decision NBC, not ASCAP or the district court, must make. NBC here proposes to administer its own repertory of compositions with the aid of a "nucleus license" from ASCAP, which it proposes to augment on an individual basis according to its needs. *Reply Memorandum on Behalf of National Broadcasting Company, Inc.,* July 10, 1970, pp. 11-13. There is no reason to believe that NBC lacks the staff or expertise necessary to determine its

[4] Moreover, at least one other commentator shares Timberg's view and concludes that in the wake of the Amended Decree (Shull, *supra* at 53): "ASCAP can no longer demand that a licensee take the whole portfolio and it must license on a per piece basis whenever requested to do so." Clearly the parties to the decree contemplated licensing on this basis, as Section IX(A) expressly refers to applications for "any, some or all of the compositions in the ASCAP repertory."

music requirements and acquire a repertory to meet its needs. But its incentive to do so is obviously affected by ASCAP's willingness to cooperate in that effort. In the first place, Section VI provides the only basis available for licensing works owned by inaccessible ASCAP members. Even ASCAP probably would be unable to obtain licenses for an appreciable part of its repertory if it had to actually contact individually its widely dispersed membership to do so. And the need to obtain rights to the inaccessible segment is probably crucial for NBC's purposes. Secondly, it is obviously true that the more NBC can include in its "nucleus license" the less administrative burden it assumes and the greater the likelihood that it will undertake the effort. Thus, unless NBC has ASCAP's cooperation, it will, as a practical matter, be forced to accept a license for ASCAP's entire repertory. Quite obviously it will have no logical incentive thereafter to bargain for individual rights it already has under a blanket or per program ASCAP license. This makes a refusal to deal for less than ASCAP's entire repertory an effective interference with individual licensing in clear violation of the express terms of Section IV(A); and, the necessary effect is that the dominance of ASCAP, based upon its authority to license pooled copyrighted works, is being used to eliminate price competition between individual ASCAP compositions.

In our view this is not a "package licensing" problem, at least in the same sense as *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948) and *United States* v. *Loew's, Inc.,* 371 U.S. 38 (1962), relied upon heavily by NBC before the district court. *Reply Memorandum of National Broadcasting Company, Inc.,* May 1, 1970, pp. 2-5. Those cases involved instances of group licensing of copyrighted

feature films. The licensee in each case was found to take, use, and pay for films he did not want and that were presumably of inferior quality. The tied films did not compete with each other in any sense of the word, but were simply gaining a free ride on the market power of one or more desired features.

This is not the case here. At the time a license fee is determined, it is not contemplated that the licensee will use ASCAP's entire repertory. This is evident from the fact that under Section XI of the Amended Decree, primary consideration in the distribution of fees collected by ASCAP must be given to the number of performances received by a member's works as determined by objective surveys. See generally *United States* v. *ASCAP (Zekley)*, Nos. 871-874 (C.A. 2, May 7, 1971). What happens is that a licensee pays for the right to use any number of works in ASCAP's repertory, but can freely choose among them. The works thus do compete on their intrinsic merits; and, their owners, as a basic proposition, are compensated only to the extent that their compositions are actually used.[5] But what is eliminated under a license for

[5] What *is* arguably tied to desired compositions is the protection against copyright infringement that comes from holding the rights to use ASCAP's entire repertory. ASCAP has argued that this justifies its refusal to deal here on NBC's terms. *E.g.*, J.A. 279a-280a. But the protection thus afforded is limited, since ASCAP does not control all copyrighted music. Moreover, there is no reason to believe that the problem of chance infringements —that may occur from live broadcasts of events and performances not entirely under NBC's control—cannot be worked out separately. In any event this speculative problem cannot afford a sufficient basis for a judicially engrafted exception to the antitrust laws.

For similar reasons, arguments that group licensing is necessary as a countervailing force to NBC's superior bargaining power are not apposite here. See J.A. 273a-279a. These contentions are rooted in a philosophy of protectionism which is at odds with poli-

ASCAP's entire repertory is price competition between ASCAP members. This result is tolerated to the extent that blanket and per program licensing is a practical necessity. It is on that basis that the result in *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (C.A. 9), certiorari denied, 389 U.S. 1045 (1967), can be supported. There the courts upheld ASCAP's licensing practices against the challenge of local broadcasters who concededly could not negotiate directly with individual ASCAP members for performing rights. NBC has not made a similar concession here, and in fact wants to begin dealing directly. ASCAP's refusal to cooperate is thus not based upon practical necessity, is without legal justification, and is simply a collective arrangement with the effect of maintaining prices: a *per se* antitrust violation. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940).

We recognize, of course, that the question before this Court is what the decree requires, not the broader antitrust consequences of ASCAP's refusal to negotiate a license for less than its entire repertory. It is our posi-

cies favoring free competition which are fostered by the antitrust laws. In the rare instances when competitive imbalance or other policy interests have been found to require protection of any group —for example, fair trade laws and the labor exemption from antitrust—this decision has been made by the legislature, not the judiciary. If ASCAP members must be insulated from price competition among themselves, that protection should be framed by Congress, not by an antitrust court interpreting and enforcing a decree intended to promote competition. And, of course, should NBC abuse its economic power in dealing for performing rights, that might well be an appropriate matter for a separate action under the antitrust laws.

NBC's proposal to create competition for ASCAP music has the potential to benefit more than NBC. The experience gained from competitive pricing should provide a basis for fee determination in instances where users are themselves unable to engage in direct bargaining for individual works.

tion that these antitrust issues were the direct concern of the parties in negotiating the 1950 Amended Consent Decree, having been squarely raised by the decisions in *Alden-Rochelle* and *M. Witmark, supra.* The resulting decree was intended to preserve opportunities for price competition by guaranteeing the right to bargain for individual licenses.

II. This Case Is Not Controlled by This Court's Decision in Shenandoah.

The instant case is distinguishable from this Court's decision in *Shenandoah, supra.* There local broadcasters attempted to force ASCAP to issue a license limited to programs they produced and originated themselves. There was no dispute over the number of compositions to be included in their requested license. Networks already held licenses under Section V that made separate licenses for local stations using network material unnecessary. The local stations wanted to compel their other sources of programing to do the same by obtaining licenses for performing rights when they paid for sound track synchronization rights. The Court found that Section V requires ASCAP only "to grant licenses that will *permit* networks and producers to clear at the source; it does not benefit local broadcasters and there is no requirement that they be offered this additional protection." 331 F.2d at 123 (emphasis in original). It concluded that Section VII alone defines the rights of local broadcasters and requires ASCAP only to issue per program licenses and to assure that such licenses represent "a genuine economic choice" *vis-a-vis* a blanket license. 331 F.2d at 122-123. It construed Section IX(A) as procedural only and Section VI as a general provision that does not override "the specific and detailed provisions relating to television stations, networks and producers." 331 F.2d at 124. The Court thus found that the precise question raised was controlled by "specific and detailed" provisions that defined ASCAP's obligations and barred, by necessary implication, the interpretation urged by the local broadcasters.

Here there are no specific provisions that exclude, by implication or otherwise, an obligation to license on a partial repertory basis. Section V, contrary to the district court's holding, does not in any way relate to partial repertory licenses. That section, as *Shenandoah* held, is concerned with the right of networks and producers to obtain licenses for their programing which include the right for simultaneous and delayed broadcasts on local stations. 331 F.2d at 123. It does not address itself at all to the number of compositions that must be licensed. And Section VII clearly is intended only to require that ASCAP issue licenses that are based upon actual use:[6] that certainly is not inconsistent with what NBC seeks here. What NBC desires is to use Section VI to obtain a "nucleus license" upon which they may build through competitive bargaining. This Court stated in *Shenandoah* that (331 F.2d at 124):

> . . . what [Section VI] says is that ASCAP must place itself in a position where, without the members' assent, it can grant the request of any applicant who wants the whole ASCAP repertory but that it may not grant a license for particular compositions without the member's request or notice to him.

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[6] Otherwise ASCAP could extend the lawful copyright monopoly by imposing charges unrelated to actual use. Compare *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 131-141 (1969).

Appendix

This construction is fully consistent with the interpretation urged here: that ASCAP cannot interfere with individual licensing, which it does, in violation of Section IV (A), by refusing to use Section VI to comply with NBC's request.

CONCLUSION

For the foregoing reasons, the judgment below should be set aside, and the case remanded to the district court with directions that it order ASCAP to ascertain its authority to license the individual works of its members, as requested by NBC, in accordance with Section VI of the Amended Consent Decree, and to determine a reasonable fee in accordance with Section IX(A) for such compositions as ASCAP may thus become authorized to license.

Respectfully submitted,

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JULY 1971.

APPENDIX

Section IV of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby enjoined and restrained from:
>
> (A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;
>
> (B) Limiting, restricting, or interfering with the right of any member to issue to a user non-exclusive licenses for rights of public performance;
>
> (C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;
>
> (D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;
>
> (E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;
>
> (F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copy-

right infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing betwneen ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

Section V of the 1950 Amended Consent Judgement provides:

> Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:
>
> (A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;
>
> (B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription

or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP

and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

Section VI of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospective user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such

member shall have failed to reply within thirty (30) days thereafter.

Section VII of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:
>
> (A) Enjoined and restrained from issuing any license, the fee for which
>
> (1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or
>
> (2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

> (1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based

upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

Section IX of the 1950 Amended Consent Judgment provides:

> (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writ-

ing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A) hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this judgment be construed as importing any validity or value to any of said copyrights.

Section XI of the 1950 Amended Consent Judgment provides:

> Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary consideration to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 1971, I deposited in the United States mail, postage prepaid, two copies of the attached Brief of Plaintiff, United States of America, and one copy of the attached Motion to File Brief, addressed to each of the counsel for Defendant-Appellee and Applicant-Appellant listed below:

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